Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

STATE OF OHIO,
Petitioner,

vs.

CHERYL LESSIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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83 pp

QUESTION PRESENTED FOR REVIEW

WHETHER A RULING THAT ALL FLAG BURNINGS ARE *PER SE* PROTECTED SPEECH UNDER THE FIRST AMENDMENT AND CANNOT BE CONSIDERED BY A JURY IN A PROSECUTION FOR INCITING TO VIOLENCE IMPERMISSIBLY EXPANDS THE HOLDING OF *TEXAS V. JOHNSON*, 491 U.S. 397 (1989), AND UNCONSTITUTIONALLY ABRIDGES THE STATE'S LEGITIMATE GOVERNMENTAL INTEREST IN PREVENTING VIOLENCE?

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Stephanie Tubbs Jones, the Prosecuting Attorney for Cuyahoga County, Ohio, on behalf of the State of Ohio, petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court, entered in this proceeding on October 27, 1993.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 67 Ohio St. 3d 487 (1993) and is attached hereto at Appendix p. A1.

The opinion of the Eighth District Court of Appeals for Cuyahoga County, Ohio was entered on April 23, 1992 and is attached hereto at Appendix p. A22.

The journal entry of the trial court was entered on December 28, 1990 and is attached hereto at Appendix p. A60.

JURISDICTIONAL STATEMENT

The opinion of the Ohio Supreme Court was entered on October 27, 1993. The State did not file a motion for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. amend. I, in relevant part:

> Congress shall make no law *** abridging the freedom of speech ***.

Appendix p. A62.

Ohio Revised Code Sec. 2917.01:

> (A) No person shall knowingly engage in conduct designed to urge or incite another to commit any offense of violence, when either of the following apply:
>
> (1) Such conduct takes place under circumstances which create a clear and present danger that any offense of violence will be committed.
>
> * * *

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STATEMENT OF THE CASE

Following a jury trial in the Cuyahoga County Court of Common Pleas, respondent was convicted of inciting to violence and sentenced to a term of one year's imprisonment.

On August 10, 1990, at approximately 4:45 p.m., a demonstration was held at Public Square in downtown Cleveland, Ohio to protest President Bush's decision to send troops to the Persian Gulf. Respondent, Cheryl Lessin, participated in the demonstration with fifteen to twenty other demonstrators to speak on behalf of the Revolutionary Communist Party. Using a portable sound system, respondent read prepared statements denouncing the United States' military action and criticizing United States foreign policy in the Middle East.

A crowd of one hundred to one hundred fifty people began to gather in and around Public Square (Tr. 234). One of respondent's fellow demonstrators produced a United States flag and told the crowd that it should be burned. A bystander in the crowd tried to grab the flag, and ultimately members of the crowd and some demonstrators engaged in a tug of war over the flag (Tr. 366).

Other demonstrators produced lighter fluid and a Bic butane lighter, while the struggle over the flag continued (Tr. 368). Respondent eventually recovered the flag and set it on fire (Tr. 274, 317, 410). A cardboard sign belonging to the demonstrators was also set on fire by the crowd (Tr. 369-70). When a young man tried to put out the sign's fire, the hair on his legs was burned and his tennis shoes were charred (Tr. 370).

The level of intensity throughout the crowd escalated after the burnings, becoming a "near riotous situation" (Tr. 250-51, 390). People were pushing and shoving, and being shoved in return (Tr. 234-35).

Respondent ran through the crowd throwing punches at people, and people punched her in return (Tr. 237, 241, 313, 317-18). Respondent was tussling with the crowd, screaming obscenities, and yelling "Fuck the United States. I hate this country. Long live the Revolutionary Communist Party." (Tr. 238-39, 317, 392).

Officers Deli and Sowa, Cleveland police officers, arrived at Public Square in response to a radio broadcast requesting all officers in the area to proceed to Public Square where a large fight was in progress (Tr. 232-33, 263, 305). The flag had been burned before they arrived (Tr. 242).

Officer Deli observed respondent run through the crowd punching people (Tr. 241, 274). Significantly, after an elderly woman was knocked down, Officer Deli placed respondent under arrest for inciting to violence (Tr. 239-41, 274, 313). The officers' intent in arresting respondent was to stop the violence, disperse the crowd, and restore the peace (Tr. 321).

The officers asked respondent if she wanted to file charges against any of the people in the crowd who hit her (Tr. 250, 343-44). Respondent stated that she did not (Tr. 250-51, 343-44).

Respondent was charged with inciting to violence in violation of Ohio Revised Code Section 2917.01. A jury trial commenced on October 22, 1990. At respondent's trial, the trial court gave the following jury instruction:

> The first Amendment to the United States Constitution guarantees to all persons the right to free speech and the government may not prohibit the expression of an idea, simply because society finds the idea itself offensive or disagreeable.
>
> The offense charged in this case applies to situations where speech and or conduct is abused, but only when the speech or expression co: sciously, under explosive circumstances, spurs others to violence.
>
> You will hear the term clear and present danger during the course of further instructions. This means that the state may limit speech and/or conduct which promotes or incites violence provided there is an obvious and immediate danger that such conduct or speech will actually result in violence, not simply public inconvenience, annoyance or unrest.
>
> To support conviction, the State of Ohio must prove that the defendant in fact, engaged in conduct or speech which urged or incited others to act violently.

(Tr. 565-66). Respondent was convicted of inciting to violence and sentenced to a term of one year's imprisonment. The Ohio Court of Appeals affirmed respondent's judgment of conviction.

In a four-to-three decision, the Ohio Supreme Court reversed respondent's conviction. The majority held that it was reversible error to allow the jury to consider respondent's act of flag burning as one of the factors in her conviction for inciting to violence.

> We cannot uphold Lessin's conviction for the crime of inciting violence because it is impossible to say with any degree of certainty that her burning of the United States flag was disregarded by the jury in reaching its verdict. The trial court's instruction given to the jury on free speech did not serve to

> adequately protect the defendant's rights because it did not inform the jury that . . . *the jury is not to consider the fact that Lessin burned the flag in determining whether she is guilty of inciting violence.*

State v. Lessin, at 494-95 (emphasis added).

Three justices dissented. The dissenters noted that the case was not about flag burning or free speech but, rather, about inciting to violence.

> This case is *not* about flag burning. This case is *not* a *Texas v. Johnson* (1989), 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 case. This case is *not* about the right to assemble publicly. This case is *not* about free speech. This case is about a woman who was charged, tried and convicted of violating R.C. 2917.01(A)(1), which law prohibits any person from inciting another person(s) to commit any offense of violence.

Lessin, at 496 (Douglas, *J.* dissenting) (emphasis in original). The dissenters further stated that in a prosecution for inciting to violence, in which flag burning is one of the factors leading to the violence, the jury must be able to consider the flag burning as part of the totality of the circumstances. *Lessin*, at 499 (Gwin, *J.* dissenting).

> [R.C. 2917.01(A)(1)] is specifically and narrowly designed to protect the state from expression which is directed toward inciting or producing imminent lawless[ ] action and which is likely to incite or produce such action. This statute complies with the law set forth in *Brandenburg, supra.* Therefore, in determining whether a person has violated the Ohio statute which proscribes inciting violence, the totality of the circumstances must be considered.

> These circumstances include, but are not limited to, Lessin's: screaming of obscenities; hollering, "Fuck the United States [,], I hate this country"; running through the crowd; and burning the national flag.
>
> Therefore, it was not reversible error for the trial court to decline instructing the jury that it may not consider evidence of burning the United States flag as proof of Lessin's guilt of inciting violence.

Lessin, at 498-99 (Gwin, *J.* dissenting).

REASONS FOR ALLOWANCE OF WRIT

In holding that flag burning is *per se* protected speech and may not be considered by a jury in a prosecution for inciting to violence, the Ohio Supreme Court has rendered a decision on an important question of constitutional law that conflicts with decisions of this Court. *See e.g., Texas v. Johnson,* 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989); *Grayned v. City of Rockford,* 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); and *United States v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968).

The decision below unconstitutionally abridges the state's legitimate governmental interest in preventing violence, eliminates jurors' ability to consider the actual circumstances of a case in a prosecution for inciting to violence, and impermissibly expands this Court's holding in *Texas v. Johnson,* 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).

"[W]here demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Grayned v. City of Rockford,* 408 U.S. 104, 116, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). *See also Boos v. Barry,* 485 U.S. 312, 331, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988); *United States v. O'Brien,* 391 U.S. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). States may prohibit the advocacy of the use of force or of law violation "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

Guidance from this Court is needed so that state governments may adequately protect their legitimate interest in preventing violent breaches of the public

peace. Moreover, because of the Ohio Supreme Court's strained interpretation of this Court's holding in *Texas v. Johnson, supra*, this case presents an attractive opportunity to revisit and clarify the pronouncement made in *Texas v. Johnson*.

1. THE OHIO SUPREME COURT'S RULING UNCONSTITUTIONALLY ABRIDGES THE STATE'S LEGITIMATE GOVERNMENTAL INTEREST IN PREVENTING BREACHES OF THE PEACE.

The Ohio Supreme Court erred in ruling that, because flag burning was protected speech, it could not be considered by the jury in a prosecution for inciting to violence. Rather, when speech and nonspeech elements are intertwined, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968).

The state's interest in preventing breaches of the peace, R.C. 2917.01(A)(1), is unrelated to the suppression of expression. Thus, the government's regulation should be evaluated under the standard enunciated in *United States v. O'Brien, supra*, at 376. *See Texas v. Johnson*, at 403, 109 S. Ct. at 2538; *Spence v. Washington*, 418 U.S. 405, 414, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974).

Under the standard articulated in *United States v. O'Brien*, the government's regulation can be justified if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4)

the incidental restriction on alleged first amendment freedoms is no greater than necessary to promote the interest. *United States v. O'Brien*, at 377.

First, it is within the constitutional power of the government to punish conduct which poses an imminent threat of continuing an ongoing breach of the peace. *Cantwell v. Connecticut*, 310 U.S. 296, 304, 84 L. Ed. 1213, 60 S. Ct. 900, 903 (1940); *Goguen v. Smith*, 471 F.2d 88, 102 (1st Cir. 1972), *aff'd sub nom State v. Goguen*, 415 U.S. 566, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974). "[W]here demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Grayned v. City of Rockford, supra*, at 116. *See also Boos v. Barry, supra*, at 331.

Second, suppression of respondent's conduct furthers an important and substantial interest in protecting against further breaches of the peace. *Goguen v. Smith, supra*, at 102.

> [I]t is within the constitutional power of the state to punish flag desecration which presents some immediate threat of breach of the peace . . . .

Id. Respondent's flag burning actions occurred in a context of violence. Demonstrators and spectators were engaging in a tug of war over the flag. After the flag was burned, the violence escalated, and people began punching, shoving, and pushing. In such a situation, the government's interest in punishing breaches of the peace and activity which is likely to cause a continuation of the breach is both substantial and important.

Third, the government's punishment of respondent for inciting to violence was directly related to protecting against violence. The punishment was not related to the

likely communicative impact of respondent's expressive conduct but to the time, place, and manner in which respondent chose to act.

Finally, punishing respondent for inciting to violence is no greater a restriction than necessary to prevent breaches of the peace. Respondent burned the flag in the context of violence and along with punching, pushing, and shoving bystanders. It was respondent's burning the flag in the context of violence that threatened to provoke further violence and made punishing respondent for inciting to violence necessary.

The government may properly prosecute flag burnings which lead to breaches of the peace. Indeed, in *Texas v. Johnson*, this Court indicated that flag burnings which incite to violence should be prosecuted:

> The State need not worry that our holding will disable it from preserving the peace. *We do not suggest that the First Amendment forbids a State to prevent imminent lawless action. . . .* And, in fact, *Texas already has a statute specifically prohibiting breaches of the peace. . . .*

Texas v. Johnson, 491 U.S. at 410, 109 S. Ct. at 2542 (emphasis added).

Since flag burnings which incite to violence may be prosecuted by the state, and since the facts in the instant case establish the occurrence of actual violence, the Ohio Supreme Court erred in ruling that respondent's flag burning was protected and could not be considered by the jury in respondent's prosecution for inciting to violence.

2. THE OHIO SUPREME COURT'S RULING ELIMINATES JURORS' ABILITY TO CONSIDER THE ACTUAL CIRCUMSTANCES OF A CASE IN A PROSECUTION FOR INCITING TO VIOLENCE.

In evaluating whether a defendant's conduct incited to violence, the State must present objective evidence which demonstrates the imminence of public unrest or a clear and present danger of a breach of the peace. In considering whether a defendant's conduct has incited to violence, the fact-finder must look to the actual circumstances in the particular case.

> [W]e have not permitted the Government to assume that every expression of a provocative idea will incite a riot, but have instead required *careful consideration of the actual circumstances* surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Texas v. Johnson, 491 U.S. at 409, 109 S. Ct. at 2542 (*quoting Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969)) (emphasis added).

The state has a legitimate power to prevent breaches of the peace. Ohio's statutory proscription against inciting to violence is an attempt to exercise this power. Respondent was not prosecuted because she burned the flag; she was prosecuted because she incited to violence. Respondent's flag burning was only one of the factors, including her punching, shoving, and pushing, that led to her prosecution for inciting to violence.

By ruling that the jury could not consider respondent's burning of the flag as one of the factors leading to her conviction for inciting to violence, the

Ohio Supreme Court eliminated the jurors' ability to consider the actual circumstances of the case and unconstitutionally abridged the state's legitimate governmental interest in preventing breaches of the peace. *Texas v. Johnson*, at 409, 109 S. Ct. at 2542; *Brandenburg v. Ohio*, at 447.

3. THE OHIO SUPREME COURT'S RULING IMPERMISSIBLY EXPANDS *TEXAS V. JOHNSON*, 491 U.S. 397 (1989).

The instant ruling by the Ohio Supreme Court, that flag burning is protected and cannot be considered by the jury as a factor in a prosecution for inciting to violence, impermissibly expands this Court's holding in *Texas v. Johnson*, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).

In *Texas v. Johnson*, this Court stated:

> We have not automatically concluded, however, that any action taken with respect to our flag is expressive.

Texas v. Johnson, 491 U.S. at 405, 109 S. Ct. at 2540. This Court also indicated that, where flag burning incites to violence, persons can be prosecuted for inciting to violence:

> The State need not worry that our holding will disable it from preserving the peace. *We do not suggest that the First Amendment forbids a State to prevent imminent lawless action. . . .* And, in fact, *Texas already has a statute specifically prohibiting breaches of the peace. . . .*

Texas v. Johnson, at 410 (emphasis added).

The instant case is factually distinguishable from *Texas v. Johnson*. In *Texas v. Johnson*, "no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag." *Texas v. Johnson, supra*, at 2541. Likewise, in *Monroe v. State Court of Fulton County*, 739 F.2d 568 (11th Cir. 1984), the state introduced no objective evidence to demonstrate the imminence of public unrest or a clear and present danger of breach of peace. Finally, in *Spence v. Washington, supra*, there was no evidence of violence or, indeed, that anyone other than the police officers witnessed the defendant's displaying of the flag.

Unlike *Texas v. Johnson* and *Spence v. Washington*, the instant case is not a case involving a conviction for desecrating a venerated object. This is not a case involving a conviction for engaging in speech. This is not a case in which a protester burned a flag at a point remote in time and place from violence. Rather, this is a case where respondent voluntarily placed herself into a crowd of one hundred to one hundred and fifty people during rush hour, engaged in a tug of war with the flag, set it afire, punched, pushed and shoved bystanders, and was pushed and shoved in return. Under these circumstances, the government's prosecution of respondent for inciting to violence passes the standard enunciated in *United States v. O'Brien, supra*.

By ruling that the jury could not consider respondent's burning of the flag as one of the factors leading to her conviction for inciting to violence, the Ohio Supreme Court impermissibly expanded the holding in *Texas v. Johnson*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided October 27, 1993)

No. 92-847

THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellee,

vs.

CHERYL LESSIN,
Appellant.

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[487] [Cite as *State v. Lessin* (1993), 67 Ohio St.3d 487]

Criminal procedure—Criminal offense charged arises from conduct that encompasses both a constitutionally protected act and an act that is not constitutionally protected—Trial—Instructions by court—Failure of court to instruct jury that it may not consider evidence of the constitutionally protected act as proof of defendant's guilt is reversible error.

When a criminal offense charged arises from conduct that encompasses both a constitutionally protected act and an act that is not constitutionally protected, failure of the trial court to instruct the jury that it may not consider evidence of the constitutionally protected act as proof of the defendant's guilt is reversible error.

See:West's Ohio Digest, Criminal Law 777, 1173.2(9).

(No. 92-847—Submitted March 17, 1993—Decided October 27, 1993.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 61106.

On August 10, 1990, a public demonstration was held in downtown Cleveland to protest President Bush's decision to send troops to the Persian Gulf. Defendant-[488] appellant, Cheryl Lessin, participated in the demonstration to speak on behalf of the Revolutionary Communist Party. When Lessin arrived at Public Square between 4:30 and 4:45 p.m., she met with fifteen to twenty other people directly associated with the demonstration. Using a portable sound system which was made available to her, Lessin read her prepared statements, which denounced the current United States military action and criticized United States foreign policy in the Middle East. A small crowd of about a dozen people began to gather. At some point during Lessin's speech, a fellow demonstrator produced a United States flag and told the crowd that it should be burned because it is a symbol of violence. Someone from the crowd, apparently offended by the demonstrator's proposed actions, tried to pull the flag out of the demonstrator's hands and a tug of war over it ensued. While Lessin and the other demonstrator were trying to regain possession of the flag, they were also engaging members of the crowd in arguments about flag burning. Eventually, Lessin recovered the flag and burned it.

While on routine patrol as members of an undercover police unit, Cleveland Police Officers George Deli and Ignatius Sowa received two radio broadcasts concerning the disturbance in front of Terminal Tower. Upon their arrival shortly before 5:00 p.m., the officers parked their

unmarked police car about forty yards from Terminal Tower and approached the situation from different directions on foot.

At trial, officer Deli gave the following account of what he saw at the scene. Deli stated that upon exiting the police car, he observed a crowd of approximately one hundred to one hundred fifty people in the general vicinity of Terminal Tower. While some people were just standing, others were milling about, pushing and shoving each other in apparent confusion. Cheryl Lessin then caught Deli's attention. He stated that Lessin was leading two other women in rushing through the crowd. As this group of three were moving back and forth, Deli observed Lessin shoving people, throwing punches and being punched at by members of the crowd. Deli testified that Lessin was screaming obscenities at the crowd and hollering, "Fuck the United States. I hate this country. Long live the Revolutionary Communist Party." Deli stated that Lessin used these words to "work[ ] them (the crowd) up into a frenzy" and thereby urge them to commit acts of violence. After seeing an elderly woman get knocked down by the crowd, Deli approached Lessin and arrested her. The crowd then began to disperse without incident.[1]

[489] Deli testified that he did not know that a flag had been burned until after the crowd was brought under control. On cross-examination, however, Deli admitted that the second radio broadcast informed the officers that a flag had been burned. Although Deli did not recall

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[1] Officer Sowa gave a similar account of the events at the demonstration, which he described as "borderline chaotic." He stated that no more than five minutes had transpired between the time he and his partners arrived at Terminal Tower and Lessin was arrested.

mentioning anything about flag burning when he arrested Lessin, he later admitted saying, "she burned the flag" upon arresting her.

Jack Hagan, a Plain Dealer reporter, and Alana Meyers, a member of an environmental activist group participating in the protest, testified for the defense. Hagan arrived at Public Square around 3:30 p.m. or 4:00 p.m. to cover the demonstration. Both Hagan and Meyers testified that they observed Lessin speaking to the crowd over the portable sound system, and the struggle over the flag. Hagan stated that the size of the crowd and its emotional level grew after Lessin burned the flag. According to both Hagan's and Meyers' testimony, they did not see Lessin punch anyone or run through the crowd flailing her arms in the manner described by the police. Hagan stated that the only physical contact he witnessed was when one of the protesters was slapped in the face by a woman who opposed her views.

Lessin testified on her own behalf. Although she agreed that there was "pretty heated debating" going on, she neither encouraged nor witnessed any acts of violence. The only time she admitted to running around was before the flag was burned when she briefly tried to recover it from a person in the crowd.

On August 16, 1990, Lessin was indicted by a grand jury for inciting to violence, R.C. 2917.01. Her jury trial commenced on October 22, 1990. Before any witnesses took the stand, the jury was shown three videotapes depicting edited portions of what occurred on August 10, 1990, at approximately 4:50 p.m. to 5:00 p.m., on Public Square. Lessin was subsequently convicted as charged

and was sentenced to a one-year term of incarceration. The court of appeals, in a two-to-one decision, affirmed Lessin's conviction.

This cause is now before the court pursuant to the allowances of a motion for leave to appeal.

STEPHANIE TUBBS JONES, *Cuyahoga County Prosecuting Attorney,* and GEORGE J. LONJAK, *Assistant Prosecuting Attorney,* for appellees.

CHRISTOPHER D. STANLEY; SCHREIBER, ROSSMAN & ASSOC. CO., L.P.A. and ALAN C. ROSSMAN; FRIEDMAN & GILBERT and TERRY H. GILBERT; KAISER & KAISER and MARK A. KAISER, for appellant.

GOLD, ROTATORI, SCHWARTZ & GIBBONS CO., L.P.A. and LOIS ROBINSON; and KEVIN FRANCIS O'NEILL, urging reversal for *amicus curiae,* American Civil Liberties Union of Ohio.

[490] MOYER, *C.J.* Appellant has raised several propositions of law before this court.[2] All propositions have been properly presented for our review. However, since we have determined that the trial court's failure to properly instruct the jury that flag burning as a mode of expression enjoys the full protection of the First Amendment, our review will be limited to only that error, mandating reversal of appellant's conviction.

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[2] The following propositions of law have been raised by appellant:

1. "Appellant's conviction violates the First Amendment of the United States Constitution."

(a) "O.R.C. 2917.01 is unconstitutionally overbroad, as applied and on its face, because it permitted appellant to be convicted for conduct and speech under the First Amendment to the United States Constitution."

(Footnote continued on following page.)

Appellant was charged and convicted for violating R.C. 2917.01(A)(1), which reads:

> "(A) No person shall knowingly engage in conduct designed to urge or incite another to commit any offense of violence, when either of the following appl[ies]:

(Footnote continued from preceding page.)

(b) "Appellant's conviction must be reversed, because it was premised in large part upon expression protected by the First Amendment, and any guilty verdict based upon testimony elicited and evidence presented by the state of appellant's unprotected conduct, standing alone, was against the manifest weight of the evidence, not sufficient to sustain a conviction or a verdict under Ohio Crim.R. 29, and violative of appellant's right to due process of law."

(c) "The appellant was denied her constitutional right to a fair trial by the trial court not properly instructing the jury, thereby allowing them to convict appellant for engaging in expression protected under the First Amendment."

2. "The court erred in denying the appellant the opportunity to have a voir dire conducted so that appellant's preemptory [*sic*] challenges could be intelligently rendered, and challenges for cause effectively asserted in violation of the appellant's Sixth Amendment right of effective assistance of counsel."

3. "The trial court denied the appellant a fair trial by not properly instructing the jury as to an essential element of O.R.C. 2917 [*sic*]."

4. "Appellant's conviction must be reversed, because the trial court had secret communications with the jury while it was deliberating, which prejudiced the appellant."

5. "The appellant was denied a fair trial by the actions, conduct and prejudice of the trial judge."

6. "Appellant was deprived of her liberty without due process of law by her conviction and sentencing for inciting to violence in violation of O.R.C. Section 2917.01 where appellant's sentence was in violation of her Eighth Amendment right prohibiting excessive, unfair and cruel and unusual punishment."

> "(1) Such conduct takes place under circumstances which create a clear and present danger that any offense of violence will be committed."

The prosecution's theory of the case was not that appellant made statements directing either her fellow demonstrators or members of the audience to commit acts of violence. Officer Deli, in fact, agreed with defense counsel on cross-examination that Lessin neither said "[g]o and assault someone," "[c]ommit violence against these other people in the crowd" or "burn down Terminal [491] Tower." Instead, the state sought to prove that Lessin violated R.C. 2917.01(A)(1) by pushing, shoving and punching people as she rushed through an angry crowd after already having raised its intensity level by denouncing United States foreign policy and by burning the United States flag. According to the state's theory, Lessin violated R.C. 2917.01(A)(1) by provoking the use of force against herself and her fellow demonstrators. Lessin's actions thus suggested that she willingly made herself the target of the hostile crowd's violent reactions in order to dramatize the strength of her convictions and, perhaps, draw sympathetic attention to her cause. Also implied by the state's theory is that Lessin intended to provoke a violent episode in order to secure coverage of the antiwar demonstration by the local television news media. Since her conduct was directed towards inciting violence under potentially explosive conditions where violence was very likely to occur, the state urged the jury to find Lessin guilty of violating R.C. 2917.01(A)(1).

It is evident from our review of the record that Lessin was partly engaged in expressive conduct protected by the First Amendment during the August 10, 1990 demonstration at Public Square. Her burning of the flag is afforded the same protection against criminal

punishment under the First and Fourteenth Amendments as are her words spoken in public criticism of United States foreign policy. A seminal United States Supreme Court opinion, *Texas v. Johnson* (1989), 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342, determined that flag desecretion is "sufficiently imbued with elements of communication" to implicate the constitutional right to free speech.[3] Because Johnson's political expression (burning the American flag at a staged political demonstration in Dallas during the 1984 Republican National Convention) was "restricted because of the content of the message he conveyed," *Johnson*, 491 U.S. at 412, 109 S.Ct. at 2543, 105 L.Ed.2d at 359, the court held that his First Amendment rights were violated.

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[3] Recognizing that the right to freedom of speech is a more generalized guarantee of freedom of expression, Justice Brennan, writing for the majority in *Johnson*, stated:

> "The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. While we have rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea,' *United States v. O'Brien* [391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1988)], *supra*, at 376 [88 S.Ct. at 1678, 20 L.Ed.2d 672, 679], we have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments,' *Spence* [*v. Washington* (1974)], *supra*, [418 U.S. 405] at 409 [94 S.Ct. 2727, 2730, 41 L.Ed.2d 842, 846].
>
> "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' 418 U.S. at 410-411 [94 S.Ct. at 2730]." *Johnson*, 491 U.S. at 404, 109 S.Ct. at 2539, 105 L.Ed.2d at 353.

[492] In rejecting Texas's argument that the state's interest in preventing breaches of the peace justifies prohibition of Johnson's selected manner of protest, the United States Supreme Court stated:

> "The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' [Citations omitted.] It would be odd indeed to conclude *both* that 'if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection,' [citation omitted] *and* that the Government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.
>
> "Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' *Brandenburg v. Ohio,* 395 U.S. 444, 447 [89 S.Ct. 1827, 1829, 23 L.Ed.2d 430, 434, 48 O.O.2d 320, 322] (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan)." *Johnson,* 491 U.S. at 408-409, 109 S.Ct. at 2542, 105 L.Ed.2d at 356-357.

While Lessin's right to verbally criticize her government's foreign policy and her right to burn the United States flag without urging people to commit violent acts can in no way form the basis of a conviction under R.C. 2917.01, Lessin's alleged assaults of passersby are not constitutionally protected from criminal sanction under the First and Fourteenth Amendments. Our duty is to ensure that the jury's guilty verdict neither transgressed nor contravened Lessin's freedom of expression. In this regard, the United States Supreme Court has cautioned:

> "[W]hen a single-count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." *Street v. New York* (1969), 394 U.S. 576, 588, 89 S.Ct. 1354, 1363-1364, 22 L.Ed.2d 572, 582-583.

[493] The risk that a jury will premise its guilty verdict on constitutionally protected conduct is reduced, if not completely eliminated, by an accurate and thorough set of jury instructions which direct the jury to refrain fron considering certain evidence as proof of guilt. In this case, the role of the jury instructions was critical in obviating the possibility that each juror would convict based on his or her personal prejudices against flag burners and Communists. Accordingly, the question is whether the jury instructions sufficiently guarded against a guilty verdict being rendered, in whole or part, upon constitutionally protected political expression.

The Ohio Rules of Criminal Procedure provide that the trial judge shall charge the jury in accordance with Crim.R. 30.[4] Construing Crim.R. 30(A), we have stated that "[a]fter arguments are completed, a trial court must fully and completely give the jury all instructions which are *relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.*" (Emphasis added.) *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus. It is not crucial that the instruction given contain the precise verbiage as proffered by a party:

> "In a criminal case, it is not mandatory upon a trial court to give requested instructions to the jury verbatim, but if the requested instructions contain a correct, pertinent statement of the law and are

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[4] The current version of Crim.R. 30 provides:

> "(A) Instructions; error; record. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court need not reduce its instructions to writing.
>
> "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.
>
> (B) Cautionary instructions. At the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case."

> appropriate to the facts they must be included, at least in substance, in the court's charge to the jury. ***" *State v. Nelson* (1973), 36 Ohio St.2d 79, 65 O.O.2d 222, 303 N.E.2d 865, paragraph one of the syllabus.

Appellant submitted a proposed jury instruction on free speech which was either rejected in part or amended in part by the trial judge. The rejected [494] portion of appellant's proposed instruction, which we find constitutes reversible error, reads as follows:

> "The First Amendment protects free speech. The state cannot prosecute someone for exercising her right to free speech. *The law applicable to this case is that* speaking *& burning the flag are protected speech and are protected by the [F]irst [A]mendment & the def[endant] cannot be convicted for such activity.*" (Emphasis added.)

In determining whether the trial judge erred in failing to give appellant's proposed instruction relating to the First Amendment and protected speech, the court of appeals erroneously employed the abuse of discretion standard of review. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. ***" (Citations omitted.) *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 173, 404 N.E.2d 144, 149. We previously applied the abuse of discretion standard to review a trial court's decision not to give a defendant's requested instruction that his inebriated condition negated the specific intent element of the crime of murder pursuant to R.C. 2903.02, and held that it is within the sound discretion of the trial court to determine whether the evidence presented at trial is sufficient to require that instruction be given. *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d

443, paragraph two of the syllabus. However, unlike *Wolons*, the determination of whether the trial court erred in failing to give Lessin's proposed instruction concerning flag burning does not involve an inquiry going to the sufficiency of the evidence to support that specific instruction. Here, the fact that Lessin burned the United States flag is uncontroverted. Therefore, the trial court had an obligation as a matter of law to give Lessin's proffered instruction on flag burning because, in the absence of this instruction, the jury could consider protected speech as evidence that Lessin was guilty of R.C. 2917.01(A)(1). Accordingly, we hold that when a criminal offense charged arises from conduct that encompasses both a constitutionally protected act and an act that is not constitutionally protected, failure of the trial court to instruct the jury that it may not consider evidence of the constitutionally protected act as proof of the defendant's guilt is reversible error. See *Williams v. North Carolina* (1942), 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.Ed. 279, 282:

> "To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights."

We cannot uphold Lessin's conviction for the crime of inciting violence because it is impossible to say with any degree of certainty that her burning of the United States flag was disregarded by the jury in reaching its verdict. The trial court's [495] instruction given to the

jury on free speech[5] did not serve to adequately protect the defendant's rights because it did not inform the jury that (1) flag burning in the absence of a call to violence is protected speech under the First Amendment and (2) the jury is not to consider the fact that Lessin burned the flag in determining whether she is guilty of inciting violence. Without being instructed in accordance with the law set forth in the above-emphasized portion of appellant's proffered instruction, there is an unacceptable possibility that the jury considered a constitutionally protected act in finding her guilty under R.C. 2917.01(A)(1). The necessity of giving a more precise instruction is further underscored because of the following exchange which occurred between defense counsel and the trial judge during voir dire:

> "MR. ROSSMAN: How many of you are aware of recent Supreme Court cases that says [*sic*] it's okay to burn the flag?

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[5] That instruction reads:

> "The [F]irst Amendment to the United States Constitution guarantees to all persons the right to free speech and the government may not prohibit the expression of an idea, simply because society finds the idea itself offensive or disagreeable [*sic*].
>
> "The offense charged in this case applies to situations where speech and or conduct is abused, but only when the speech or expression consciously, under explosive circumstances, spurs others to violence.
>
> "You will hear the term [']clear and present danger['] during the course of further instructions. This means that the state may limit speech and/or conduct which promotes or incites violence provided there is an obvious and immediate danger that such conduct or speech will actually result in violence, not simply public inconvenience, annoyance or unrest.
>
> "To support conviction, the State of Ohio must prove that the defendant in fact, engaged in conduct or speech which urged or incited others to act violently."

"MR. LONJAK: Objection.

"THE COURT: The objection is sustained. *There has been no Supreme Court case, to my knowledge, that permits under any circumstances that it's okay to burn the flag.* That's why the lawyers have been instructed not to discuss the issues of law. And don't do it again, Mr. Rossman.

"MR. ROSSMAN: May I discuss it at sidebar?

"THE COURT: No, you may not." (Emphasis added.)

The trial court's statement is clearly error because it is in direct conflict with the holding in *Texas v. Johnson.* Having determined that the trial judge failed to guard against the possibility that the jury would consider constitutionally protected speech in convicting appellant for inciting violence, we reverse appellant's conviction. Our decision rests in large part on our awareness of the depth of those personal convictions that consider flag desecration as a repugnant and intolerable act. This is the reason persons unhappy with governmental decisions find burning the United States flag an irresistible method of communicating the [496] degree of their dissatisfaction. Therefore, in circumstances like those now before us, the jury must be instructed in accordance with *Texas v. Johnson* so that it does not encroach upon the defendant's freedom of expression when returning a guilty verdict. We should not presume that, absent an instruction on flag burning, a jury will disregard such disgraceful and irreverent action in its deliberations on whether the flag burner incited a crowd to violence in violation of R.C. 2917.01(A)(1).

Accordingly, the judgment of the court of appeals affirming appellant's conviction is reversed and the cause is remanded to the trial court for proceedings not inconsistent with this opinion.

Judgment reversed
and cause remanded.

A.W. SWEENEY, WRIGHT and PFEIFER, *JJ.*, concur.

DOUGLAS, RESNICK and GWIN, *JJ.*, dissent.

W. SCOTT GWIN, *J.*, of the Fifth Appellate District, sitting for F.E. SWEENEY, *J.*

DOUGLAS, *J.*, dissenting. This case is *not* about flag burning. This case is *not* a *Texas v. Johnson* (1989), 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 case. This case is *not* about the right to assemble publicly. This case is *not* about free speech. This case *is* about a woman who was charged, tried and convicted of violating R.C. 2917.01(A)(1), which law prohibits any person from inciting another person(s) to commit any offense of violence. The record here, even as set forth in the majority opinion, leads to the inescapable conclusion that appellant's actions (with or without the flag burning) could reasonably be construed by a jury to contravene the proscription of R.C. 2917.01(A)(1).

Appellant was not merely expressing a provocative idea. She was also *acting* and it is this behavior that offends the statute. There has been much discussion in this case concerning *Brandenburg v. Ohio* (1969), 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430. I believe the proper emphasis from *Brandenburg*, in the context of the case at bar, should be on *Brandenburg's* language that the states may not prohibit the advocacy of the use of

force or of law violation "***except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (Footnote omitted and emphasis added.) *Id.* at 447, 89 S.Ct. at 1829, 23 L.Ed.2d at 434.

That is exactly what happened here—appellant's actions incited and brought about imminent lawlessness. In this regard, I find *State v. Hoffman* (1979), 57 Ohio St.2d 129, 11 O.O.3d 298, 387 N.E.2d 239, both instructive and helpful. The jury in the instant case, the trial judge, and two judges of the court of appeals believed, and I believe, that appellant crossed the line and, thereby, clearly [497] violated R.C. 2917.01(A)(1). Her *actions*, for which she was convicted, have nothing to do with her burning the flag or with free speech. The verdict of the jury, the judgment of the trial court and that of the court of appeals should be affirmed. Because the majority does not do so, I respectfully dissent.

RESNICK and GWIN, *JJ.*, concur in the foregoing dissenting opinion.

GWIN, *J.*, dissenting. I respectfully disagree with the majority's conclusion that the act of burning the national flag is *per se* protected expression under the First Amendment to the United States Constitution and that the jury could not consider Lessin's act of burning the national flag in determining whether she was guilty of inciting violence in violation of R.C. 2917.01(A)(1).

To read the majority opinion, the citizens of Ohio would conclude that a person who burns the American flag is granted absolute immunity from criminal prosecution. In fact, it would appear the majority is giving the act of burning our national flag more

protection than what is afforded free speech under the First Amendment. The United States Supreme Court has stated:

> "[W]e reject the view that freedom of speech *** as protected by the First and Fourteenth Amendments, are 'absolutes,' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. See, *e.g., Schenck v. United States*, 249 U.S. 47 [39 S.Ct. 247, 63 L.Ed. 470]; *Chaplinsky v. New Hampshire*, 315 U.S. 568 [62 S.Ct. 766, 86 L.Ed. 1031]; *Dennis v. United States*, 341 U.S. 494 [71 S.Ct. 857, 95 L.Ed. 1137]; *Beauharnais v. Illinois*, 343 U.S. 250 [72 S.Ct. 725, 96 L.Ed. 919]; *Yates v. United States*, 354 U.S. 298 [77 S.Ct. 1064, 1 L.Ed.2d 1356]; *Roth v. United States*, 354 U.S. 476 [77 S.Ct. 1304, 1 L.Ed.2d 1498]. On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." *Konigsberg v. State Bar of California* (1961), 366 U.S. 36, 49-51, 81 S.Ct. 997, 1006-1007, 6 L.Ed.2d 105, 116-117.

It has been well established that the First Amendment does not afford protection to a person who screams "fire" in a crowded theater. Nor does the right to free speech allow a person to defame another or utter fighting words [498] which are likely to incite imminent violence. See *Brandenburg v. Ohio* (1969), 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430. Under the same logic, the government has a valid interest in regulating speech and expression which under certain circumstances are likely to create "a clear and present danger." *Schenck v. United States, supra*, 249 U.S. at 52, 39 S.Ct. at 249, 63 L.Ed. at 473. Accordingly, it is of utmost importance in measuring the protection afforded to free expression to carefully consider the surrounding circumstances of the expression to determine whether it is directed toward inciting or producing imminent lawless action and is likely to incite or produce such action. *Brandenburg*, 395 U.S. at 447, 89 S.Ct. at 1829, 23 L.Ed.2d at 434.

Although it is well established that the First Amendment does not afford absolute protection for all speech and expression, the majority of this court is of the opinion that all instances of burning the United States flag are constitutionally protected from criminal sanction. In reaching this decision, the majority relies on *Texas v. Johnson* (1989), 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342. In that case, Gregory Lee Johnson was convicted under a Texas statute prohibiting a person from intentionally or knowingly desecrating a state or national flag. In affirming the reversal of Johnson's conviction, the United States Supreme Court determined that the Texas statute impermissibly infringed upon a person's right to freedom of speech and expression because such person could be convicted for burning a flag even though this act did not threaten to disturb the peace. In other words, a resident of Texas could have

been charged with violating the criminal statute for burning a national flag in the privacy of his own home or under circumstances where it offended no one. This statute clearly infringed upon that person's right to freely express his opinions under the First Amendment.

Nevertheless, the United States Supreme Court did not hold that in every instance a person who burns a flag is afforded absolute protection from criminal prosecution. The First Amendment certainly does not afford protection to a heckler who would appear at a United States war veteran's ceremony screaming epithets against the United States and burning the national flag on stage. This situation would likely create imminent lawlessness in the form of a riot. The heckler's right to free speech and expression would be outweighed by the state's interest in preserving the peace, and, under those circumstances, the state would be permitted to criminally charge the heckler with inciting violence. Under today's ruling, the state of Ohio has no recourse in preventing the imminent lawlessness.

The statute upon which Lessin was charged and convicted reads that "[n]o person shall knowingly engage in conduct designed to urge or incite another to commit any offense of violence *** when *** [s]uch conduct takes place [499] under circumstances which create a clear and present danger that any offense of violence will be committed[.]" R.C. 2917.01(A)(1). This statute is specifically and narrowly designed to protect the state from expression which is directed toward inciting or producing imminent lawlessness action and which is likely to incite or produce such action. This statute complies with the law set forth in *Brandenburg, supra.* Therefore, in determining whether a person has violated the Ohio statute which proscribes inciting violence, the

totality of the circumstances must be considered. These circumstances include, but are not limited to, Lessin's: screaming of obscenities; hollering, "Fuck the United States[,] I hate this country"; running through the crowd; and burning the national flag.

Therefore, it was not reversible error for the trial court to decline instructing the jury that it may not consider evidence of the burning the United States flag as proof of Lessin's guilt of inciting violence. The "totality of circumstances" test would instead require the trial court to instruct the jury that in some instances flag burning is a constitutionally protected act, but under other circumstances it is not.

DOUGLAS and RESNICK, *JJ.*, concur in the foregoing dissenting opinion.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS, EIGHTH DISTRICT, CUYAHOGA COUNTY, OHIO

(Dated April 23, 1992)

No. 61106

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CHERYL LESSIN,
Defendant-Appellant.

APPEARANCES:

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JOURNAL ENTRY AND OPINION

Criminal appeal from Court of Common
Pleas Case No. CR-256, 379

AFFIRMED.

FRANCIS E. SWEENEY, *P.J.*:

Defendant-appellant, Cheryl Lessin, timely appeals the jury finding that appellant is guilty of inciting to violence (R.C. 2917.01). For the reasons set forth below, we affirm the appellant's conviction.

The pertinent testimony adduced at trial is as follows:

Patrolman George Deli of the Cleveland Police Department testified that on August 10, 1990, at approximately 4:45 p.m., he and Detective Sowa were patrolling the area of East 40th Street and Euclid Avenue in an unmarked police car when they received a call to respond to the Public Square area. At approximately 5:00 p.m., Officer Sowa parked the vehicle about forty yards away from Terminal Tower. As Officer Deli exited the car, he observed a crowd of

approximately 100-150 people pushing and shoving each other in confusion. He observed the appellant, along with two other women, rushing through the crowd in an S-shape pattern, shoving people, throwing punches, and being punched at in the crowd. The three women were all wearing white T-shirts with a picture of Mao Tse Tung on the front. The officer testified appellant was hollering, "Fuck the United States. I hate this country. Long live the Revolutionary Communist Party." When appellant circled around to head back through the crowd, an elderly lady was knocked to the ground by the crowd. The officer stopped the appellant and placed her under arrest both because the crowd was getting out of control and for her own safety. Shortly thereafter, peace was restored to the area. Officer Deli testified he did not know a U.S. flag had been burned until the crowd calmed down.

On cross-examination, Officer Deli admitted that as he was arriving to the scene, a second radio dispatch stated that a flag had been burned. He also admitted that when he arrested appellant, he stated she had burned an American flag.

Detective Ignatius Sowa of the Cleveland Police Department testified that he arrived on the scene with Officer Deli in front of the Terminal Tower at approximately 5:00 p.m. The crowd was "borderline chaotic." Members of the crowd were pushing and shoving each other. Several people got knocked down, including an elderly woman. Three women, one of whom was appellant, were wearing Mao Tse Tung T-shirts. The appellant, along with the two other women, ran through the crowd throwing punches at people. At one point, appellant stopped momentarily to have a conversation with the other two women. She also engaged in

conversation with a couple of other people. Appellant then ran through the crowd a second time. She was yelling and screaming, "Fuck the United States. Long live the Revolutionary Communist Party. Yes, I burned the flag." Detective Sowa observed appellant throw punches at people, and punches were returned from the crowd. The violence continued to escalate. Appellant was eventually arrested. The amount of time that passed from the detectives' arrival until appellant's arrest was not more than five minutes. At the time of the detectives' arrival to the scene, most of the media people were putting their equipment away.

Jack Hagan, a Plain Dealer reporter, was the first witness to testify for the defense. On August 10, 1990, he arrived at Public Square to cover the protest. Mr. Hagan observed the appellant use a portable sound system to speak out against the U.S. involvement in the Middle East. When there were approximately twelve people gathered, one of the demonstrators reached into a bag and pulled out an American flag. A tug of war ensued between the crowd and the demonstrators over possession of the flag. One of the demonstrators eventually recovered the flag and burned it. The size of the crowd and the intensity level grew after the flag had been burned. Mr. Hagan stated that he did not see appellant run through the crowd punching people, shoving people or flailing her arms. The only physical contact he observed was when a demonstrator was slapped in the face.

Appellant testified in her own defense that she was a spokesperson for and founding member of the Revolutionary Communist Party. She testified that the Revolution Book Store organized the demonstration and asked her to participate in it. When appellant arrived at Public Square, there were approximately fifteen to

twenty people present who were connected with the demonstration. Appellant read a statement concerning U.S. military aggression in the Middle East. During her speech, an elderly white man walked up to her and called her a "Commi slut." Appellant told him to be quiet and that he was being disruptive. At some point, a demonstrator pulled out a flag. Appellant and other demonstrators became involved in a tug of war with individuals from the crowd over possession of the flag. The flag was jerked out of her hands, and she fell to the ground. Eventually, appellant saw the flag lying on the ground and burned it. She went back to the sound system to engage the crowd in a focused debate. After a short time, the sound system quit operating. A crowd of approximately eighty people had gathered around her. A man came up to the appellant and apologized for pushing her. While appellant was trying to find a leaflet for the man, Officer Deli grabbed her and stated that she was under arrest for burning the flag.

Alana Meyers testified that she is a member of the Northeast Greens Organization, an environmental and social activist group. On August 10, 1990, she arrived at Public Square at approximately 4:00 p.m. to participate in the protest. Ms. Meyers observed appellant speaking to a crowd of approximately ten to twenty people over a speaker. A man began to yell obscenities at the appellant. Shortly thereafter, a struggle ensued over a flag. After the flag was burned, the intensity level of the crowd increased. Ms. Meyers did not see the appellant push or threaten anyone. A man came through the crowd and arrested the appellant.

Based on the above evidence, the jury found appellant guilty of inciting to violence (R. C. 2917.01). Appellant now timely appeals, raising seven assignments of error for our review.

ASSIGNMENT OF ERROR I

OHIO REVISED CODE SECTION 2917.01 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED BECAUSE IT IS VAGUE AND OVERBROAD AND IT PERMITTED APPELLANT TO BE CONVICTED FOR CONDUCT AND SPEECH PROTECTED UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellant argues that the inciting to violence statute (R.C. 2917.01) is unconstitutionally vague and overbroad on its face and as applied. This argument is without merit.

First, we address appellant's contention that R.C. 2917.01 is void for vagueness. The Due Process Clause requires the language of a criminal statute must be sufficiently definite "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *State v. Earlenbaugh* (1985), 18 Ohio St. 3d 19, 21 (citing *United States v. Harriss* [1954], 347 U.S. 612, 617).

R.C. 2917.01 provides:

> (a) No person shall knowingly engage in conduct designed to urge or incite another to commit any offense of violence, when either of the following apply:
>
> > (1) Such conduct takes place under circumstances which create a clear and present danger that any offense of violence will be committed;
> >
> > (2) Such conduct proximately results in the commission of any offense of violence.
>
> (B) Whoever violates this section is guilty of inciting to violence, a felony of the third degree.

We find that the above language is sufficiently definite to provide clear and adequate notice of the conduct proscribed therein. A person may be found guilty of violating R.C. 2917.01 if he engages in conduct "designed" to urge or incite another to commit any offense of violence. "Design" is commonly defined as intent, purpose, or contemplation. *Webster's Third New International Dictionary* (1986), 611. The conduct also is required to take place under circumstances which create a clear and present danger that any offense of violence will be committed or when the conduct proximately results in the commission of violence. This language is narrowly drawn and sufficiently defined as to provide a person with notice of the type of conduct which it prohibits. Accordingly, the statute is not unconstitutionally vague, indefinite or uncertain.

We next address appellant's contention that R.C. 2917.01 is overbroad on its face. Appellant argues that the statute is overbroad because persons can be convicted for expressing an unpopular opinion which results in threats from a hostile audience. We disagree.

A statute is overbroad when the scope of the statute is so broad that it includes activity which would otherwise be legal. *South Euclid v. Richardson* (1990), 49 Ohio St. 3d 147, 151.

The state may limit speech and expression which preach violence, provided there is a clear and present danger that such conduct will actually result in the evil which the state has the right to prevent. *Schenck v. United States* (1919), 249 U.S. 47, 63. This "clear and present danger" exception to First Amendment protected speech has been articulated as follows:

> *** the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg v. Ohio (1969), 395 U.S. 445, 447.

Upon a review of the legislature's comment to R.C. 2917.01, it is clear that an offender can be found guilty of this section only if his speech or actions are designed to move others to violence. The legislature's note to R.C. 2917.01 states, in pertinent part, that "[t]his section provides a proscription against abuse of the right of free speech and expression by consciously, and other explosive circumstances, spurring others to violence." In addition, the express wording of R.C. 2917.01 includes a "clear and present danger" test by its requirement that the conduct take place under circumstances which create a clear and present danger that any offense of violence will be committed or such conduct must proximately result in the commission of any offense of violence. Therefore, we find that the statute is not unconstitutionally overbroad since it encompasses only conduct designed to urge or incite another to commit any offense of violence where a clear and present danger exists that violence will result. Based on the above analysis, we also conclude that the statute was not unconstitutionally overbroad as applied to appellant since she was prosecuted for actions which fall within the "clear and present danger" exception to the First Amendment.

Accordingly, Assignment of Error I is overruled.

ASSIGNMENT OF ERROR II

APPELLANT'S CONVICTION MUST BE REVERSED, BECAUSE IT WAS PREMISED UPON ACTIONS AND SPEECH WHICH ARE PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND WAS INSUFFICIENT TO SUSTAIN A VERDICT UNDER OHIO CRIM. R. 29.

Appellant argues that her conviction was against the manifest weight of the evidence and was insufficient to sustain a Crim. R. 29 motion for acquittal. This argument is without merit.

In reviewing the weight of the evidence, an appellate court's function is to determine if there was evidence which, if believed, would convince the average person of the accused's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St. 3d 273; *State v. Eley* (1978), 56 Ohio St. 2d 169, syllabus.

The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 19 Ohio St. 2d 320, 231. The inquiry is, after viewing the evidence in the light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*

A court shall enter a judgment of acquittal only if the evidence is such that reasonable minds cannot find that each material element of a crime has been proven beyond reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St. 261.

R.C. 2917.01 provides, in pertinent part, that no person shall knowingly engage in conduct designed to urge or incite another to commit any offense of violence when such conduct takes place under circumstances which create a clear and present danger that any offense of violence will be committed or proximately results in the commission of any offense of violence.

In the present case, competent, credible testimony was adduced at trial that appellant "rushed" through a crowd in an S-shaped pattern pushing and shoving people, throwing punches and being punched at by people in the crowd. Appellant then circled around and ran through the crowd a second time, causing an elderly woman to be knocked down by the crowd. Therefore, we conclude that reasonable minds could find appellant guilty of knowingly engaging in conduct designed to urge or incite others to commit an offense of violence under a clear and present danger that any offense of violence would be committed or engaged in such conduct that resulted in an offense of violence. The jury was free to find the state's witnesses more credible than the defense witnesses. Accordingly, the conviction was not against the manifest weight of the evidence and was sufficient to sustain appellant's conviction.

Assignment of Error II is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT DENIED THE APPELLANT A FAIR TRIAL BY NOT PROPERLY INSTRUCTING THE JURY, THEREBY ALLOWING THEM TO CONVICT FOR PROTECTED SPEECH AND ACTIVITY.

Appellant argues the trial court denied appellant a fair trial by giving erroneous, misleading and insufficient jury instructions. Specifically, appellant argues the trial court failed to explain the mens rea requirement of "designed to urge or incite another" and failed to give proposed instructions relating to protected speech. These arguments are without merit.

First, appellant failed to object to the omission of a definition of the term "design." Thus, appellant may not now claim this omission as error. Crim. R. 30. A party does not waive his objections to the court's charge by failing to formally object thereto where (1) the record affirmatively shows that a trial court has been fully apprised of the correct law governing a material issue in dispute and (2) the requesting party has been unsuccessful in obtaining the inclusion of that law in the trial court's charge to the jury. *State v. Wolons* (1989), 44 Ohio St. 3d 64.

In the present case, appellant did not apprise the court of the definition of the term "design." Thus, appellant waived his objection to the trial court's failure to give this instruction.

Appellant also argues that the trial court erred in failing to give appellant's proposed instruction relating to the First Amendment and protected speech. The trial court has discretion as to the language of its instructions to the jury and is not bound by the requested language of counsel. *Jenkins v. Clark* (1982), 7 Ohio App. 3d 93.

Upon a review of the trial court's instructions to the jury, we find the trial court did properly instruct the jury regarding a person's right to free speech under the First Amendment.

Accordingly, Assignment of Erorr III is overruled.

ASSIGNMENT OF ERROR IV

THE COURT ERRED IN DENYING THE APPELLANT THE OPPORTUNITY TO HAVE A VOIR DIRE CONDUCTED SO THAT APPELLANT'S PREEMPTORY CHALLENGES COULD BE INTELLIGENTLY RENDERED, AND CHALLENGES FOR CAUSE EFFECTIVELY ASSERTED IN VIOLATION OF THE APPELLANT'S SIXTH AMENDMENT RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant argues that she was denied her constitutional right to an impartial jury by being denied the opportunity to question into each juror's possible bias toward communists and flag burning. This argument is without merit.

In *State v. Beuke* (1988), 38 Ohio St. 3d 29, 39, the court stated:

> Determination of issues raised in voir dire in criminal cases has long been held to be within the discretion of the trial judge. *State v. Anderson* (1972), 30 Ohio St. 2d 66, 59 O.O. 2d 85, 282 N.E. 2d 568; R.C. 2945.25. No prejudicial error can be assigned the examination of veniremen in qualifying them as fair and impartial jurors unless a clear abuse of discretion is shown. *State v. Ellis* (1918), 98 Ohio St. 21, 120 N.E. 218, paragraph one of the syllabus. While R.C. 2945.27 requires that the trial

> court allow reasonable examination of prospective jurors by counsel for the defense and prosecution, *State v. Anderson, supra*, at 72, 59 O.O. 2d at 89, 282 N.E. 2d at 572, the trial court retains the right and responsibility for controlling all proceedings during the criminal trial under R.C. 2945.03, and must limit the trial to relevant and material matters with a view toward the expeditious and effective ascertainment of truth regarding the matters at issue. *State v. Bridgeman* (1977), 51 Ohio App. 2d 105, 109-110, 5 O.O. 3d 275, 277, 366 N.E. 2d 1378, 1383.

The trial court may limit questioning in the area of racial prejudices or undertake the examination itself, so long as the broad or general meaning of the inquiry is understood by prospective jurors in order to intelligently respond. *State v. Jones* (1984), 20 Ohio App. 3d 331, 332.

First, we will address the trial court's voir dire examination regarding the jurors' possible bias toward persons who burn the American flag. In the presence of the entire jury panel, the trial court questioned the first juror, Ms. Cain, as follows:

> THE COURT: My understanding of the facts of the case, again as related to me by the lawyers, is that the conduct alleged here includes activities by the defendant of allegedly burning the American flag.
>
> Is there anything about that isolated fact that an American flag was burned, that you feel would prevent you from evaluating the testimony in this case and applying it to the law I give as it relates to this charge of inciting to violence only?
>
> In other words, do you have such strong feelings about an individual who may burn an American flag that would prevent you from fairly, in your own mind, evaluating the defendant's actions in this case under the circumstances?
>
> MS. CAIN: No.

The trial court then proceeded to ask each juror, among other things, the following question:

> THE COURT: From what you heard about the case, the charge and the alleged conduct, do you think you would have any problem sitting as a fair and impartial juror?

The second juror who was asked this question by the trial court, Mrs. Canty, responded that she felt she should be excused because she had feelings about persons who burn the flag. This juror was later excused from the panel. The remaining jurors were then asked the above question and responded that they had no bias against appellant.

It is apparent from a review of the voir dire examination that the prospective jury panel was repeatedly informed that appellant allegedly burned a flag. In fact, the first juror was specifically asked whether appellant's alleged conduct of burning an American flag would prevent her from being impartial. Thus, we find that the trial court's question to each proposed juror regarding whether they could be fair and impartial based on what they had heard about the case, and the appellant's alleged conduct, was understood by the jurors as an inquiry as to any bias they had toward a person who burns an American flag. This understanding is apparent from the second juror's response that she did have feelings about burning the flag. The trial court's request that further questioning on this potential bias was not to be repeated by either party was a reasonable limitation on counsel's voir dire examination. See, *Id.* Therefore, we find the trial court did not abuse its discretion in limiting further questioning in this area.

Finally, appellant contends the trial court did not allow reasonable questioning on the jury's possible bias toward communism. This argument is equally without merit. The record reveals that the prospective jury was repeatedly informed that appellant was a communist. The trial court specifically questioned the prospective jury regarding its possible bias against appellant's political affiliation as follows:

> THE COURT: Sustained. I have already instructed the jury or told them that at the end of the trial I'm going to tell you, if the defendant or any other witness who testifies, regardless of what their political affiliation may be, you are to evaluate the testimony of the police officers the same as you will in evaluating the testimony of all the witnesses.
>
> I've asked you already, does anybody have a problem in that area and you have told me no. Now, does anybody have a problem in that area?
>
> THE JURY: No.

Furthermore, defense counsel questioned the jurors on several occasions regarding their possible bias toward communism. On one occasion, defense counsel questioned the entire jury as follows:

> MR. ROSSMAN: We don't have to put on a case, but if we expect you to hold the State of Ohio to their burden. Does anyone have a problem with that?
>
> This is set up as the State of Ohio v. Cheryl Lessin, but can you all accept the fact that we're all members of the State of Ohio, even Cheryl Lessin. Even if you find out that she is a proclaimed communist, can you also remember that she is also a member of the state?
>
> THE JURY: Yes.
>
> you also remember that she is also a member of the state? [sic]
>
> THE JURY: Yes. [sic]

Therefore, we find that the trial court allowed reasonable questioning on the jury's possible bias toward communists. It was within the trial court's discretion to limit questioning in these areas during the voir dire examination.

Accordingly, Assignment of Error IV is overruled.

ASSIGNMENT OF ERROR V

APPELLANT WAS DEPRIVED OF HER LIBERTY WITHOUT DUE PROCESS OF LAW BY HER CONVICTION AND SENTENCING FOR INCITING TO VIOLENCE IN VIOLATION OF R.C. SECTION 2917.01, WHERE APPELLANT'S SENTENCE WAS IN VIOLATION OF HER EIGHT (SIC.) AMENDMENT RIGHT PROHIBITING EXCESSIVE, UNFAIR AND CRUEL AND UNUSUAL PUNISHMENT.

Appellant contends she should have been charged under the specific assault (R.C. 2903.13) and complicity (R.C. 2923.03) statutes rather than the general inciting to violence (R.C. 2917.01) statute. This argument is without merit.

Where there is no manifest intention by the legislature that a general provision of the Revised Code takes precedence over a specific provision, the specific provision prevails. *State v. Volpe* (1988), 38 Ohio St. 3d 191; see, R.C. 1.51.

The inciting to violence (R.C. 2917.01) statute provides, in pertinent part, that no person shall knowingly engage in conduct designed to urge or incite another to commit any offense of violence when such conduct takes place under circumstances which create a clear and present danger that any offense of violence will be committed.

The assault (R.C. 2903.13) statute provides, in pertinent part, that no person shall knowingly cause or attempt to cause physical harm to another.

The complicity (R.C. 2923.03) statute provides, in pertinent part, that no person, acting with the kind of culpability required for the commission of an offense, shall solicit or procure another to commit the offense.

The legislature's comments to R.C. 2917.01 state, in pertinent part:

> Regardless of the apparent atmosphere in which an inciter's conduct takes place, if his speech or actions are designed to move others to violence and actually do so, he is guilty of an offense under this section. In this respect, it is sufficient if he advocates some kind of violence and some kind of violence is committed as a result. If his conduct ultimately impels his listeners to commit arson, he cannot plead that his conduct only urged action amounting to simple riot. Conversely, if he urges arson, he cannot subsequently plead that the only incident which resulted was the "trashing" of a few parked cars. The former Ohio law on inciting only prohibited inciting to first degree riot. One of the phenomena of mob dynamics, however, is that assemblies which begin as merely disorderly frequently degenerate into Donnybrook Fairs. *Agitators could use this phenomenon to their advantage, and escape accountability for their actions by carefully advocating a lesser species of violence, knowing that the odds ultimately favored more serious results.*
>
> While an offender may be guilty of a violation of this section even though no violence actually results from his conduct, *it should be noted that if violence does result he is guilty not only of an offense under this section but also of complicity in the resulting crime, under section 2923.03 of the Revised Code.*

Inciting to violence is a felony of the third degree.

(Emphasis added.)

We conclude that the legislature intended for R.C. 2917.01 to take precedence over specific statutes covering "lesser species of violence" and the complicity statute based on their comment that "[a]gitators could use [the mob] phenomena to their advantage, and escape accountability for their actions by carefully advocating a lesser species of violence, knowing that the odds ultimately favored more serious results." It is apparent that the legislature imposed a more severe sentence under the inciting to violence statute than under the assault and complicity statutes since the harm which can result from "the phenomena of mob dynamics" can be greater than the harm which results from the assault and complicity statutes. Therefore, we find that appellant's conviction and sentence for inciting to violence (R.C. 2917.01) did not violate her Eighth Amendment right prohibiting excessive and unfair punishment.

Assignment of Error V is overruled.

ASSIGNMENT OF ERROR VI

APPELLANT'S CONVICTION MUST BE REVERSED, BECAUSE THE TRIAL COURT HAD SECRET COMMUNICATIONS WITH THE JURY WHILE IT WAS DELIBERATING, WHICH PREJUDICED THE APPELLANT.

Appellant contends the trial court's communications with the jury during deliberations, in the absence of counsel, prejudiced the appellant. This argument is without merit.

Any communication to the jury outside the presence of the parties to a case by either a judge or court personnel is error which may warrant the ordering of a new trial. *State v. Schiebel* (1990), 55 Ohio St. 3d 71, 84 (citing *Rushen v. Spain* [1983], 464 U.S. 114). Such communications are required to be made in the presence of the defendant or parties so that they may have an opportunity to be heard or to object before the judge's reply is made to the jury. *Bostic v. Connor* (1988), 37 Ohio St. 3d 144, 149. The private communications between judge and jury have been found to be prejudicial to the defendant only when the jury's verdict might have been influenced by the judge's response. *Id.*

In the present case, the jury commenced deliberations on a Wednesday afternoon, October 24, 1990. The first note and the court's response were delivered that afternoon or the morning of October 25, 1990 and read as follows:

> Define in more explicit terms definition of attempt. In particular, "planned to culminate in the commission of a crime" and "to constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose." Also, define in more explicit terms "*designed* to urge or incite another to commit an offense of violence." What is unrest and how does it relate or contrast with violence. Foreman, Chris Kutsick.
>
> You have rec'd the instructions of law applicable to this case. Judge Patricia Cleary

This question was read to defense counsel. The second note to the court was delivered on Thursday, October 25, 1990 and read as follows:

> Does there have to be a majority vote by the jurors to declare ourselves a hung jury? Foreman, Chris Kutsick

No. Judge Patricia Cleary

This second note was not disclosed to defense counsel. On Friday morning, October 26, 1990, the jury sent its third note, which read as follows:

> It appears that after several days of deliberation, we are a hung jury. How do we proceed? Foreman, Chris Kutsick

The trial court, in open court, over objections, gave the jury the "Howard" charge. The fourth note was sent during the afternoon of October 26, 1990. The note and response read as follows:

> Please be advised that the jury cannot come to a unanimous decision. We concur that we are a hung jury. Chris Kutsick, Foreman.
>
> You will continue your deliberation in accord with the instructions contained in the "Howard" charge given earlier. Judge Patricia Cleary

The fourth note was not disclosed to defense counsel. Later, at approximately 4:00 on October 26th, a fifth note was sent by the jury. This fifth note was also not disclosed to defense counsel. The note and response read as follows:

> There are some jurors concerned about getting home in the later hours. If deliberations continue can provisions be made for these people. Chris Kutsick Jury Foreman.
>
> If you want to work late, I'll be happy to make arrangements. I'll also spring for dinner if you want to work late. Please discuss what hours you want to work today.

The jury left for the weekend at approximately 4:30 p.m. on Friday and came back on Monday morning. The jury returned a verdict on Monday, October 29, 1990.

Based upon our review of the three communications that were made without disclosure to defense counsel, we find that none of the responses was of a nature to influence the jury's verdict. In response to the first note, the judge merely informed the jury that a majority vote was not required to declare themselves a hung jury. In response to the second note, the judge instructed the jury to deliberate in accord with the "Howard" charge which had been given to the jury earlier that day in the presence of defense counsel. Finally, the third note informed the jury that if they wanted to work late, the judge would provide dinner. Since the judge's ex-parte communications to the jury were insubstantive and of a limited nature, we find that appellant was not prejudiced by these communications.

Accordingly, Assignment of Error VI is overruled.

ASSIGNMENT OF ERROR VII

THE APPELLANT WAS DENIED A FAIR TRIAL BY THE ACTIONS, CONDUCT AND PREJUDICE OF THE TRIAL JUDGE.

Appellant contends her right to a fair trial was denied by the trial court's conduct and prejudice. This argument is without merit.

Any conduct by a trial judge which shows bias or prejudice against one side may constitute error since utterances or comments by the trial judge necessarily carry great weight with the jury. *State v. Kay* (1967), 12 Ohio App. 2d 38. Appellant points to several instances of alleged misconduct by the trial court which we will address in turn.

First, appellant argues the trial court showed bias in denying all of appellant's pretrial motions. Appellant contends that a review of the judge's private notes, handwritten on the pretrial motions contained in the cart file, indicate that she had already made factual determinations before hearing any evidence. Since appellant has not shown who wrote these comments, when they were written, nor how they prejudiced appellant, this argument is meritless.

Secondly, appellant complains about the trial judge's conduct during voir dire in limiting questioning on the jurors' possible bias toward flag burning and communism and in holding defense counsel in contempt. We previously addressed appellant's argument regarding the trial court's limiting of questions in Assignment of Error IV and found it to be without merit. As to defense counsel's being held in contempt, a review of the record indicates that this action was taken in response to defense counsel's continuous refusal to abide by the trial court's ruling and in challenging that ruling in front of the jury. See. R.C. 2705.01. Thus, we find the trial court's conduct does not demonstrate a bias against appellant.

Third, appellant contends that, on several occasions, the trial judge prevented her from developing the record. Since appellant has failed to point out those occasions where she was prevented from developing the record, this argument is disregarded pursuant to App. R. 12(A).

Fourth, appellant argues the trial judge demonstrated bias in refusing to allow a proposed jury instruction that flag burning during a political demonstration is protected speech. A trial judge is required to give a requested instruction only if it accurately reflects the law. *Presley v. Norwood* (1973), 36

Ohio St. 2d 29, 34. In addition, the court is not bound by the requested language of counsel as long as the substance of the charge is given to the jury. *Jenkins, supra.* As we have previously discussed in Assignment of Error III, a review of the record indicates that the trial court did properly instruct the jury regarding a person's right to protected speech. Thus, the trial court's decision not to use appellant's requested language does not demonstrate bias.

Next, the appellant contends that the trial court erred in informing the jury during voir dire that "there has been no Supreme Court case, to my knowledge, that permits under any circumstances that it's okay to burn the flag." This statement, although ambiguous, obviously meant that whether flag burning is protected speech depends upon the circumstances of each case. Any confusion by the jury as to the meaning of this statement was cured by the instructions submitted to the jury which included the following:

> The First Amendment to the United States Constitution guarantees to all persons the right to free speech and the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.
>
> The offense charged in this case applies to situations where speech and or conduct is abused, but only when the speech or expression consciously, under explosive circumstances, spurs others to violence.

Therefore, we find that appellant was not prejudiced by the ambiguous statement as the jury was properly instructed on the correct law applicable to the offense charged in this case.

Finally, appellant contends the trial judge ordered the appellant to remain in her seat at the trial table when she walked around the courtroom for a better vantage point of a blackboard being used during the cross-examination of Officer Deli. The trial court's request that appellant remain seated was pursuant to the trial judge's duty to control the proceedings in the courtroom. We cannot find that appellant was prejudiced by the trial court's response to appellant's actions.

In conclusion, we find that the trial court's conduct did not demonstrate a bias or prejudice to either side.

Therefore, appellant was not denied a right to a fair and impartial trial.

Assignment of Error VII is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SPELLACY, *J.*, concurs
BLACKMON, *J.*, dissents
(See attached opinion)

/s/ FRANCIS E. SWEENEY
Presiding Judge

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

No. 61106

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CHERYL LESSIN,
Defendant-Appellant.

DISSENTING OPINION

DATE: April 23, 1992

BLACKMON, *J.*, Dissenting:

I disagree with the majority's decision to sustain the conviction of Cheryl Lessin who in exercising her First Amendment right to speak—burned the American Flag.

Cheryl Lessin burned the American Flag—a fact avoided by the trial judge, denied by the prosecutor as the basis for the prosecution, and ignored by this court in the majority opinion.

The facts, as I understand the record, showed that Cheryl Lessin was making a speech at Public Square in front of Tower City. The speech was anti-American and opposed the Persian Gulf War. Sometime after the speech, Lessin pulled out an American Flag, burned it, and an unsympathetic crowd became hostile. The police

arrived, observed Lessin and uttered—"SHE ADMITTED BURNING THE FLAG, ARREST HER." (T274).

It is because of these facts that I believe that R.C. Section 2917.01 was unconstitutionally applied to Cheryl Lessin. I agree that the statute under *Brandenburg v. Ohio* (1969), 395 U.S. 444 is facially flawless and sufficiently drawn that its reach is narrow.

However, in applying the statute to Lessin, the State proceeded on the theory that Lessin under extremely volatile conditions burned the American Flag with the intention of inciting the crowd to violence and purposely incited others to commit acts of violence by engaging in acts of violence herself. This position in my opinion was the same position argued by the State in *Texas v. Johnson* (1989), 491 U.S. 397 and rejected by the United States Supreme Court. The difference was in *Lessin* the event occurred and in *Johnson* the prosecutor speculated that it might occur.

In *Johnson*, the Supreme Court of the United States made the following observation:

> The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 896, 93 L.Ed. 1131 (1949).

In *Terminiello* the Supreme Court set aside the conviction for breach of the peace of a member of the Union of Christian Crusaders who had made an inflammatory racial speech in a crowded auditorium in which the police were unable to keep order, and outside where an angry and turbulent crowd of more than a thousand were protesting against the speech. By "clear and present danger," said the Court, is meant something more than public inconvenience, annoyance, or unrest. One of the functions of free speech is to invite dispute, and it may not be punished merely because it stirs people to anger and creates a condition of unrest.

Thus, the question is whether this case involves a hostile audience or Cheryl Lessin intentionally inciting others to violence. Clearly, under *Johnson*, it may not be both. Therefore, if the mandate of *Johnson* is followed and an examination of the actual circumstances surrounding such expression is made, one must conclude that Lessin made a speech and burned the flag.

However, the majority concludes that she burned the flag in order to stir others to violence. Besides the fact that the record does not support this conclusion, it is equally probable that any action that took place after the burning of the flag or during the burning of the flag is consistent with the original intent of Lessin—to express dissatisfaction with America and its international policy. This, I believe, is protected expression unless of course the conduct is prohibited under *Brandenburg* as likely to provoke imminent lawless action or prohibited under *Chapkinsky v. New Hampshire* (1942), 315 U.S. 568 as fighting words.

Thus, I conclude that the burning of the flag is not provocative by itself and is protected speech; even in the face of a hostile crowd, the burning of the flag is not by

the very act, designed to inflict injury or tend to incite an immediate breach of the peace, nor is it prima facie proof of her intent to incite others to violence. In the event that she had burned the flag and made the statement: "let us go now and burn the Federal Building to the ground" and she and the crowd attempted to do so, such conduct and speech together might constitute proof of an intent to incite others to violence. Consequently, a conviction without this scenario is unconstitutional. Therefore, the statue should not have been applied to Lessin.

Furthermore, on the basis of the evidence in this record, there were a number of other individuals engaged in the same or similar conduct as that of Lessin. In fact, on videotape, Lessin was the victim of an assault when she was slapped by a young woman that was arguing with her. If Lessin's conduct was sufficient, as the majority concluded, to justify a charge pursuant to R.C. 2917.01, there were a number of people engaged in the same or similar conduct designed to do as the majority claimed, which was to urge or incite another to commit an offense of violence. Yet, Lessin was the only person arrested, charged, and prosecuted. The query is whether Lessin was selectively prosecuted because she burned the flag.

The Equal Protection Clause of the United States Constitution, embodied in the Fourteenth Amendment, is usually the basis for the claim that discriminatory enforcement of a penal statute or law by state or local officials is unconstitutional. 95 ALR 3d 280, 286.

In *Oyler v. Boles* (1962), 368 U.S. 448, the United States Supreme Court recognized that the Equal Protection clause was violated if a criminal prosecution was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

In those cases in which the defendant alleged discriminatory application of criminal laws against him, and in which the courts have specifically addressed the question of whether the alleged basis of selective prosecution was arbitrary or invidious, the courts have held that the selection of the defendant for prosecution based upon his exercise of his constitutional rights or upon his membership in an organization was made on an invidious basis. 95 ALR 3d 280, 288.

The essential elements of such a claim of discrimination are derived principally from two cases. First, the defendant is required to prove that other violators who are similarly situated are not generally prosecuted. *Ah Sin v. Wittman* (1905), 198 U.S. 500. The second element of such an equal protection violation is that the discrimination must be intentional or purposeful. *Id.* Thirdly, the defendant must prove that the selection of the defendant was based upon an invidious or arbitrary classification, or upon an unjustifiable standard. *Oyler, supra.*

An application of these essential elements to the instant case necessitates the conclusion that Lessin's prosecution was in violation of her right to equal protection.

With respect to the first essential element, there were other people, arguably violators of R.C. 2917.01 that were similarly situated to Lessin, present on that day, for whom the State had direct evidence of their conduct who were not prosecuted. If the prosecution's theory of this case is accepted along with the testimony of Detective Deli, Lessin was arrested and charged because she purposely incited others to commit acts of violence by engaging in acts of violence herself (i.e. assaulting members of the crowd). The State makes one

feeble attempt at trying to distinguish Lessin's conduct from other members of the crowd by stating that even though the crowd was hollering and throwing punches at her she never attempted to escape.

Based on the evidence contained in the record, in the form of testimony and videotape, it was readily apparent that other members of the crowd were engaged in conduct similar to, or the same as that of Lessin.

There is a female person who takes the flag from Lessin and scuffles with Lessin in an effort to keep the flag. There is another male person who is verbally abusive and obviously agitated. His opinions are voiced directly at Lessin and his conduct could have been the proximate cause for the commission of some of the alleged assaults that took place on the day in question.

If Lessin's conduct was sufficient for probable cause purposes to warrant a charge pursuant to R.C. 2917.01, the conduct of the male in the videotape certainly possessed sufficiently similar characteristics to warrant probable cause for a charge under R.C. 2917.01.

Lastly, there is the conduct of another young woman that a reasonable fact-finder could deem the same as the conduct of Lessin. The state argues that the conduct of Lessin which necessitated her arrest is that she incited others to violence, by engaging in acts of violence herself. The young woman, with which we are concerned, after shouting at Lessin for a while turns to other members of the crowd momentarily, as if seeking their approval, and then strikes Lessin in the face. This young woman is not charged with a violation of R.C. 2917.01.

Interestingly, we are not plagued by credibility concerns with respect to these three people engaging in conduct like that of Lessin because these are

observations of this court, having reviewed the videotape as part of the record.

The State further argued that it was Lessin's conduct and not her expression that resulted in her arrest and indictment:

> A careful review of the record, however, reveals that the appellant was charged because under extremely volatile conditions, she *not only* burned the American Flag with the intention of inciting the crowd to violence, but, in addition, she purposely incited others to commit acts of violence by engaging in acts of violence herself (i.e. assaulting members of the crowd). (Emphasis added.)

Brief of Appellee at 14.

Assuming that the State's representation of Lessin's conduct is accurate, there is but one characteristic of Lessin's conduct that is different from that of the other three people observed by this court in the videotape. The characteristic is that Lessin engaged in protected speech and activity when she burned a United States Flag and made statements indicating an affinity for the Communist Party. Otherwise, for purposes of probable cause, arrest, and indictment, a reasonable fact-finder could find the conduct of all four people the same for purposes of R.C. 2917.01.

For these reasons, I would have sustained assignment of error Number One and held that R.C. 2917.01 was unconstitutionally applied to Appellant in violation of her First Amendment right to speak. Although Lessin did not raise the selective prosecution argument, I would reverse her conviction for that reason as well.

Finally, the evidence was insufficient to sustain a Crim. R. 29 motion for acquittal. Lessin burned a flag and the crowd reacted. As a matter of law the burning of a flag, under *Johnson* and *U.S. v. Eichman* (1990), 110 U.S. 2404, does not provoke an immediate violent response by the average onlooker and is protected speech. Therefore, I would have sustained assignment of error Number Two.

On the remaining assignments of error, I conclude the following:

I agree with the majority's reasoning regarding assignment of error Three, however, I disagree with the majority's reasoning regarding assignment of error Four. It is my belief that the manner in which the trial court conducted the voir dire precluded an intelligent exercise of preemptory challenges and challenges for cause, in derogation of Lessin's Sixth Amendment right to effective assistance of counsel. I would have found that Lessin's Sixth Amendment right to effective assistance of counsel was violated because of the manner in which the voir dire was conducted.

The trial court has discretion over the manner in which a voir dire is conducted. This discretion is tempered by the essential demands of fairness. *Aldredge v. U.S.* (1931), 283 U.S. 308, 310. We are likewise guided by the statement in *Dowd-Feder v. Truesdell* (1938), 130 Ohio St. 533 that:

> Any rule of law which denies a litigant reasonable latitude in the examination of prospective jurors as to their qualifications, in order to enable him to exercise such preemptory challenges judiciously and intelligently, deprives him of a substantial right.

At the outset, I must discuss the statement made by the trial court "there has been no Supreme Court case, to my knowledge, that permits under any circumstances that it's okay to burn the flag. That's why the lawyers have been instructed not to discuss the issues of law. And don't do it again, Mr. Rossman." Transcript at 92.

The trial judge, in a jury trial, is the trier of the law. The jury is, and was in this case, instructed that they are duty bound to follow the law as the trial court gives it to them.

This statement is not only misleading, but in light of *Johnson, supra,* and *Eichman, supra,* may be an inaccurate statement of the law. Nevertheless, in my opinion, it had to operate to the prejudice of Lessin because of the obligation stated to the jurors to follow the law as the trial court gives it. The court did not explain to the jurors what "under any circumstances" actually meant in light of this case. To this end, assignment of error seven should be sustained. This statement was misleading, confusing and inaccurate; therefore, highly prejudicial to Lessin.

Returning to the actual supervision of the voir dire, I would have held that the restrictions placed upon the inquiry by counsel for Lessin constituted an abuse of discretion.

The state argues that there was no such abuse because the trial court asked the first two jurors, Mrs. Canty and Ms. Cain, whether they could be fair and impartial about the flag burning. This inquiry was then followed by a general statement to all the jurors about their ability to be fair and impartial on the facts of the case. This was not a sufficient inquiry for Lessin's

counsel to effectively and intelligently exercise their challenges since protected expression and activity are so often sensitive, inflammatory, and misunderstood.

Having reviewed the transcript, I would point to the number of instances after this blanket inquiry, where further questioning was warranted but denied.

The trial court admonished counsel regarding questions about prospective jurors' awareness of recent flag burning cases. The trial court sustained her own objection to an inquiry by counsel for Lessin regarding what circumstances would be necessary for Mrs. Canty to feel that flag burning should be punished. This inquiry came about after Mrs. Canty stated that she should be excused because she had feelings about burning the flag. Further inquiry was warranted after that statement and the trial court's inquiry did not cover the circumstances asked about by Lessin's counsel. Mrs. Canty further stated that she believed that someone who burns the flag should be punished. The trial court still refused any further inquiry. The trial court again sustained its own objection to an inquiry of whether someone who burned the flag was worthy of belief. The trial court again sustained her own objection to an inquiry of Ms. Cain regarding Lessin's affiliation with the Communist Party and the fact that her father fought in Vietnam. In response to a question of the jurors as to who else was anti-communist, after a prospective juror indicated she was, the trial court again sustained her own objection and stated that affiliation with a particular party was not *necessarily* relevant. (Emphasis added.) The trial court further instructed the parties that they were not permitted to explore the venire's feelings about communism any further.

These myriad examples demonstrate the trial court's unreasonable limitation on voir dire, thereby precluding counsel for Appellant from exercising intelligent challenges. Further, the trial court's interjection of her own objections continuously could be viewed as highly prejudicial. The extremely volatile issues of communist affiliation and flag burning were issues that counsel for Lessin should have been allowed to explore with reasonable latitude. The continuous trial court objections and the unreasonable limitations upon such inquiries violated Appellant's Sixth Amendment right to effective assistance of counsel and a fair trial.

In *State v. White* (November 30, 1989), Cuyahoga App. No. 56169, this court addressed the issue of a trial court's contact with a jury in the absence of proper representation by both parties.

This court should stand behind the position that a trial judge should *refrain from any contact with a jury* in the absence of proper representation by both parties. *Id.* at 8. Once the jury deliberation commences, a trial judge court's real danger in conversing with the jury outside the presence of counsel for both parties.

In the instant case, like *White*, the trial court's communications involved applicable law and factual questions. This communication was improper.

Finally, I would have reversed Lessin's conviction making assignments of error Five and Seven moot.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Dated October 29, 1990)

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, }
CUYAHOGA COUNTY } SS.

STATE OF OHIO,
Plaintiff,

vs.

CHERYL LESSIN,
Defendant.

INDICTMENT INCITING TO VIOLENCE

JOURNAL ENTRY

THIS DAY AGAIN COMES THE PROSECUTING ATTORNEY ON BEHALF OF THE STATE AND DEFENDANT, CHERYL LESSIN WAS BROUGHT INTO COURT REPRESENTED BY COUNSEL.

THE JURY IS CONDUCTED INTO COURT BY THE BAILIFF AND WITH ALL PARTIES PRESENT, RETURNED THEIR VERDICT, IN WRITING, TO-WIT: "WE, THE JURY, HAVING BEEN DULY IMPANELED AND SWORN, FIND DEFENDANT, CHERYL LESSIN, GUILTY OF INCITING TO VIOLENCE, RC 2917.01, AS CHARGED IN THE INDICTMENT".

THE COURT INFORMED THE DEFENDANT OF THE JURY'S VERDICT; JURY POLLED.

IT IS ORDERED THAT THIS CAUSE BE REFERRED TO THE PROBATION DEPARTMENT FOR A PRE-SENTENCE INVESTIGATION AND REPORT.

SENTENCING SET FOR NOVEMBER 26, 1990 AT 9:00 A.M.

DEFENDANT REMANDED TO CUSTODY.

/s/ PATRICIA A. CLEARY
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Dated December 28, 1990)

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, }
CUYAHOGA COUNTY } SS.

STATE OF OHIO,
Plaintiff,

vs.

CHERYL LESSIN,
Defendant.

INDICTMENT INCITING TO VIOLENCE

JOURNAL ENTRY

THE DEFENDANT HEREIN HAVING, ON A FORMER DAY OF COURT BEEN FOUND GUILTY BY THE JURY OF INCITING TO VIOLENCE, R. C. 2917.01 AS CHARGED IN THE INDICTMENT, WAS THIS DAY IN OPEN COURT WITH HIS/HER COUNSEL PRESENT.

THEREUPON, THE COURT INQUIRED OF THE SAID DEFENDANT IF HE/SHE HAD ANYTHING TO SAY WHY JUDGMENT SHOULD NOT BE PRONOUNCED AGAINST HIM/HER; AND HAVING NOTHING BUT WHAT HE/SHE HAD ALREADY SAID AND SHOWING NO GOOD AND SUFFICIENT CAUSE WHY JUDGMENT SHOULD NOT BE PRONOUNCED.

IT IS THEREFORE, ORDERED AND ADJUDGED BY THE COURT THAT SAID DEFENDANT, CHERYL LESSIN, IS SENTENCED TO OHIO REFORMATORY FOR WOMEN, MARYSVILLE, OHIO FOR A TERM OF ONE (1) YEAR AND COSTS. DEFENDANT ADVISED OF APPELLATE RIGHTS. DEFENDANT MADE APPLICATION FOR APPELLATE BOND TO BE RULED UPON AFTER STATE FILES IT'S REPLY. DEFENDANT REMANDED.

/s/ PATRICIA A. CLEARY
Judge

CONSTITUTION INVOLVED

United States Constitution Amendment I

AMENDMENT I [1791].

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Ohio Revised Code, Section 2917.01

INCITING RIOT, AND RELATED OFFENSES

2917.01 Inciting to violence

(A) No person shall knowingly engage in conduct designed to urge or incite another to commit any offense of violence, when either of the following apply:

(1) Such conduct takes place under circumstances which create a clear and present danger that any offense of violence will be committed;

(2) Such conduct proximately results in the commission of any offense of violence.

(B) Whoever violates this section is guilty of inciting to violence, a felony of the third degree.

HISTORY: 1972 H 511, eff. 1-1-74

Note: Former 2917.01 repealed by 1972 H 511, eff. 1-1-74; 1953 H 1; GC 12823, 12824. See 2921.02 for provisions analogous to former 2917.01.